incomplete answer) does not equate with lack of candor in the absence of intent to deceive. Moreover, TBF wholly ignores the fact that the Bureau reviewed the information in the application and determined that no additional information was necessary. Bureau counsel correctly stated the law on this point with respect to the Red Lion assignment application (Tr. 5392):

> MR. SHOOK: The Bureau's, the Bureau's position would be that the low power television branch and the Video Services Division made the determination of what materials need to be submitted in the first instance in order to satisfy that portion of the Commission that a certification is appropriate and if those portions of the Commission do not as a regular practice require submissions of these materials then, frankly, this material [i.e., evidence of Commission application standards] simply does not need to be added to the record.

The same principle applies here. If there was something that was clearly missing from the application, and the Bureau determined that such information was not necessary before it granted the application, Raystay was under no obligation to provide the material.

154. TBF miscites KQED, Inc., 5 FCC Rcd 1784, 67 RR 2d 781 (1990) and RKO General, Inc. (WNAC-TV), 78 FCC 2d 1, 98 (1980), affirmed sub nom. RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981) in its attempt to improperly broaden the Commission's definitions of misrepresentation and lack of

candor. Trinity Conclusions, ¶¶701-702 Pp. 485-486. TBF claims that those cases stand for the proposition that an applicant can be disqualified for offering a "misleading impression." What TBF improperly attempts to do is to take a statement that is true and complete on its face and argue that the statement is misleading. The statement concerning the lack of interest by other entities (see supra) is a classic example. In ¶¶312-313 of its proposed findings (P. 233), TBF takes true statements and attempts to make them misleading by inventing some impression that is allegedly false and that the statement was allegedly supposed to make. Neither the RKO nor KQED cases supports such an approach to either misrepresentation or lack of candor.

155. The Fox River decision is the classic statement of the definition of misrepresentation and lack of candor:

> Misrepresentation and lack of candor can indeed be distinguished in their manifestations: the former involves false statements of fact, while the latter involves concealment, evasion, and other failures to be fully informative. But both misrepresentation and lack of candor represent deceit; they differ only in form.

93 FCC 2d at 129, 53 RR 2d at 46. Clearly, a true statement cannot be a misrepresentation because misrepresentations involve "false statements of fact." While there can be a lack of candor when a true statement is present, there must be an

obligation to disclose something that was not disclosed. In the absence of those respective factors, plus intent to deceive, there can be no misrepresentation or lack of candor. In KQED, all the requisite elements were clearly present. The licensee told the Commission that it was going off the air for technical reasons, when in fact it knew the reasons were budgetary. 5 FCC Rcd at 1784-1785, 67 RR 2d at 782. Similarly, the RKO licensee repeatedly and willfully "withheld information that it knew or should have known to be relevant and material to pending matters" and "tried to mislead the Commission into accepting the truthfulness of those reports when [a competitor] later alleged that they contained inaccuracies." 78 FCC 2d at 93, 47 RR 2d at 994. Neither case supports the disqualification of an applicant for truthful and complete statements just because some opponent invents a subjective "impression" that was allegedly misleading.

156. TBF does suggest several "facts" that allegedly should have been disclosed in the extension application. TBF Findings, ¶315 P. 234. This list of "facts" is as follows:

> (a) that as far as Raystay was concerned, it had no viable business plan for building the station(s); (b) that it had no intention of constructing without a viable business plan; (c) that it had budgeted no funds to construct the station(s); (d) that it was barred by an agreement with its prospective lender from spending moneys to construct the

> station(s); (e) that it was working diligently to sell TV40, which it considered its LPTV "hub" and essential to developing the new stations; (f) that the construction permits "would not have been any use to us without TV40" (Tr. 5278); and (g) that if Raystay could not sell the permits when it sold TV40, it would "very likely" turn them in (Tr. 5233).

In addition, as noted above, a recurring claim of its document is that George Gardner had no intent to build the stations when Raystay filed the extension applications and that extensions were sought so the permits could be sold. These arguments will be discussed below.

2. Raystay's Business Plan

157. TBF argues that Raystay consciously "failed to disclose the true reasons why no construction had occurred..." TBF Conclusions, ¶694 P. 481. The Bureau argues that "[a]lthough Raystay was required to explain in each application why construction was not yet completed, the applications carefully avoided disclosing this information." Bureau Conclusions, ¶333 P. 171. There is no dispute as to why construction had not been completed: Raystay had not yet developed a viable business plan. Tr. 5236. TBF and the Bureau ignore the elementary point that Exhibit 1 did disclose Raystay's efforts to develop a business plan and implicitly pointed out that such a plan had not yet been developed.

There was clearly no attempt to hide the business plan from the Commission.

158. It is perfectly apparent from reading Exhibit 1 that there is no statement stating, "The reason that construction has not yet been completed is that it has not yet developed a viable business plan for the stations." The argument that Raystay was required to place such a statement in the application must be rejected because the Mass Media Bureau - the arbiter of what is required to be in the application - determined that such a statement was unnecessary. When it is clear on the face of the application that a statement is not present and the bureau processing the application grants the application, the only conclusion that can be reached is that the statement was not necessary. The Bureau's current argument is totally inconsistent with its contemporaneous actions. The Bureau clearly knew when it read Exhibit 1 that the statement in question was not present. If such a statement was deemed necessary, it could have requested additional information, dismissed the application as incomplete, or denied the application. It did none of the above. There is no basis for faulting Raystay for not providing information that the portion of the Commission who has the expertise in processing these applications deemed unnecessary.

159. Moreover, the argument that Raystay attempted to hide the business plan and its importance ignores the fact that the components of the business plan were disclosed in the exhibit. The main component of the business plan was to search for programming that would be acceptable to local cable systems so that the stations would be carried on those systems. Exhibit 1 clearly states:

> Raystay has undertaken research in an effort to determine the programming that would be offered on the station. It has had discussions with program suppliers to determine what programs could be available for broadcast on the station. It has also had continuing negotiations with local cable television franchises to ascertain what type of programming would enable the station to be carried on local cable systems.

It is implicit in that paragraph that Raystay had not yet come up with a programming format. Moreover, the use of the word "continuing" in describing the negotiations with cable systems put the Commission on notice that arrangements with those operators had not been reached. Clearly, there was no attempt to hide the status of the business plan from the Commission.

160. Both TBF and the Bureau ignore the testimony of George Gardner and Mr. Sandifer that they read Exhibit 1 as stating why construction had not been completed. George Gardner testified:

> Q. Now would you tell us where in Exhibit 1 there is a statement of the reason why construction had not been completed?
>
> A. The business plan is fairly well laid out here. It says it has continuing negotiations with the local cable television franchises to ascertain what type of programming would enable the station to be carried on a local cable system. That was the key to making the business plan work that we were, we had in place.
>
> Q. Well, did you tell the Commission in Exhibit 1 that the reason Raystay hadn't started construction was that you hadn't come up with a viable business plan?...
>
> A. I look at the fourth paragraph on Exhibit 1 as that reason, although it doesn't specifically state the reason construction has not been completed is. But that is the reason in that paragraph.

Tr. 5272-5273. Mr. Sandifer similarly saw the exhibit as generally explaining why construction had not been completed. Tr. 5102-5103. There is no basis for discrediting that testimony, which TBF and the Bureau simply ignore.

161. Another basic flaw in the argument of TBF and the Bureau is that nothing in Exhibit 1 suggests any other reason why construction had been completed or that the failure to construct was for reasons beyond Raystay's control. Since the answer to Question 7(a) of the form referred to Exhibit 1, Raystay was telling the Commission that the answer was in the exhibit. As George Gardner testified, the answer was in the exhibit, although it was not packaged in a sentence saying

"The reason construction has not been completed is..." Contrary to its current arguments, the Bureau determined no further information was needed when it processed the applications. No intent to deceive can be found because the answer was in the application. Therefore, none of the elements of lack of candor are present.

3. Raystay's Budget

162. TBF argues that Raystay was required to disclose that its budget did not provide for funds to construct the LPTV stations. TBF Findings, ¶315 P. 234. TBF has not shown any such obligation. Indeed, Glendale demonstrated in its proposed findings and conclusions that Raystay's budget was irrelevant to the Commission. Glendale Findings, ¶¶411-412 Pp. 218-219, Glendale Conclusions, ¶665 Pp. 388-389. In brief, the budget did not say anything about Raystay's plans for the stations because Raystay regularly built projects that were not covered in the budget. Moreover, no evidence has been offered that the budget was even considered in preparing the extension application and that a decision was made to conceal the budget. In the absence of any such evidence, no intent to deceive can be found.

4. The Greyhound Agreement

163. TBF wants the Presiding Judge to find that Raystay should have reported in the December 1991 extension

applications "that it was barred by an agreement with its prospective lender from spending moneys to construct the station(s)." TBF Findings, ¶315 P. 234. As Glendale has shown above, that claim is false. Glendale showed in its proposed findings and conclusions that it was not required to disclose anything about the Greyhound agreement because there was no binding agreement until after the second extension application was filed and because Raystay and its stockholders had several ways of building the stations notwithstanding what was in the agreement. Glendale Findings, ¶¶413-418 Pp. 219-221, Glendale Conclusions, ¶¶666-669, Pp. 389-392.

5. The Status of TV40

164. TBF argues that Glendale should have disclosed its negotiations concerning the possible sale of TV40 and the fact that the permits would probably not be built if TV40 was sold before they were built. TBF Findings, ¶315 P. 234. TBF ignores the elementary point that TV40 was never sold. Raystay is the licensee of TV40 to this very day. Moreover, there is no evidence that Raystay ever had any agreement to sell TV40.

165. Presumably, TBF's thesis is that Raystay's negotiations concerning TV40 are evidence that it did not want to build the permits. That thesis is severely flawed. George Gardner's testimony at Tr. 5278 makes clear he was talking about a situation where TV40 was actually sold. Indeed, he

testified that unless TV40 was actually sold, he was not inclined to sell the Lancaster and Lebanon construction permits. Tr. 5228-5229. If Raystay had sold TV40 and then sought to extend the construction permits, TBF could then argue that Raystay filed extension applications with having no intention of building the stations. That never happened. In the absence of an actual sale of TV40, the negotiations concerning TV40 were irrelevant to the extension applications, and Raystay had no obligation to report anything concerning those discussions.

6. Raystay's Intent in Seeking Extensions

166. As Glendale has shown above, the argument that Raystay sought extensions of the permits just so it could sell the construction permits is contrary to the massive weight of evidence. If Raystay sought extensions to sell the permits, why did it make no serious effort to look for a buyer after the applications were filed? Why did it continue to talk to program suppliers and cable operators in an attempt to formulate a business plan? Other such questions come readily to mind. In this section, Glendale will address some of the legal arguments made by TBF and the Bureau concerning what Raystay's state of mind allegedly should have been when it filed the extension applications.

167. In ¶699 of its proposed conclusions (Pp. 483-484), TBF writes the following:

> Finally, the Commission has expressly stated that 'implicit in the filing' of an LPTV extension application is 'an intent to construct a station and commence service.' Low Power Television Service, 51 RR 2d 476, 517 (1982). Thus a permittee seeking an extension is implicitly representing to the Commission that, despite its failure to construct so far, it has a firm present intent to proceed with construction. In the Commission's view, efforts to sell the construction permit belie an intent to construct and are grounds for denying an extension. Telemusic Company, 4 FCC 2d 221, 222-223 (1966); Gross Broadcasting Co., 26 FCC 2d 306, 311 (Rev. Bd. 1970) ('willingness to sell the construction permit' indicates that permittee 'does not intend to construct'); Hasler Productions, Inc., 1 FCC Rcd 811, 813 (MMB 1987) ('you have attempted to assign the construction permit, evidencing an intention to dispose of your authorization rather than to build the station').

These proposed conclusions are a severely distorted statement of the law. TBF is arguing that if you so much as have discussions concerning the sale of a construction permit, no extension application can be granted. Commission precedent says otherwise.

168. The first sentence of ¶699 is a blatant misstatement of the report and order on Low Power Television Service. The portion of the order cited by TBF does not deal with extension applications but with the restrictions on the

amount that can be obtained for the sale of an unbuilt construction permit. The order states:

> Allowing profit to be obtained upon transfer of a construction permit prior to commencement of program test operations appears to violate this prohibition. The permittee would appear to have nothing to convey for profit beyond the mere expectation of future profits that appends to the permit itself. Also, implicit, in the filing of an application is an intent to construct a station and commence service.

There is no mention of extension applications in that excerpt. The reference to "an application" is a clear reference to the original application for a construction permit. George Gardner testified, "The reason we applied for these construction permits in the first place was to put them on the air." Tr. 5277. Nobody has even disputed that claim. By selective and distorted quotation, TBF is attempting to make the order say something it does not say.

169. Moreover, the mere contemplation of a possible sale of a construction permit does not require denial of an extension application. As Glendale demonstrated in ¶664 of its proposed conclusions (P. 388), a permittee has the right to sell its construction permits. Moreover, the Commission routinely grants extension applications at the same time it grants an assignment of license or transfer of control application assigning or transferring the permit. Attached to

this reply are several authorizations where the Commission granted simultaneously extension and assignment or transfer applications for the same permit. If TBF was correct, those applications would have been denied because "efforts to sell the construction permit...are grounds for denying an extension." While the desire to sell a construction permit is not a justification for an extension (see Bureau Conclusions, P. 172 n.40), it is not a bar to the grant of an extension application. Nothing in Section 73.3534 of the Commission's rules prohibits the grant of an extension application because a permittee may eventually sell the permit.

170. TBF's argument that a permittee seeking an extension must have a "present firm intention" to construct is baseless. If that were the case, a permittee could not consider selling its permit, something the Commission clearly allows. Moreover, the concept of a present firm intention is not anywhere in the rule or any case law. Under that rationale, any permittee that failed to build a station after seeking an extension would be guilty of a prima facie misrepresentation. The Commission has never held that the mere failure to construct a station raises any question about a licensee's candor.

171. TBF's citation of case law may not be relied upon. The Gross Broadcasting Co. case it relies upon was reversed by the Review Board on reconsideration. Gross Broadcasting Co.,

27 FCC 2d 957, 21 RR 2d 394 (Rev. Bd. 1971).[14] The holding of Telemusic Company is not that an extension application must be denied whenever there are sales negotiations but "that the extension of a construction permit for the sole purpose of keeping it alive while protracted negotiations are conducted with prospective assignees or transferees is contrary to our responsibilities under the Act." 4 FCC 2d at 223, 8 RR 2d at 338 (emphasis added). Finally, a review of Hasler Productions, Inc., 2 FCC Rcd 811 (MMB 1987) shows that the extension application was denied not because the permittee was talking to buyers but because it disregarded a prior warning that another extension would not be granted without "a convincing showing that substantial progress had been made toward the actual construction of the physical facilities." Moreover, the Bureau did not say that the permit could never be assigned but that certain standards would have to be met before an assignment would be approved. 2 FCC Rcd at 812-813.

172. There are only two reasons for a permittee to seek an extension of a construction permit: to build the station or to sell the permit. The possibility of selling the permits

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[14] While the Commission later set aside the Board's order on reconsideration, it did not do so because of the efforts to sell the construction permit. Instead, it held that basic qualifications issues specified against the assignor must be resolved before the permit could be assigned. Gross Broadcasting Co., 31 FCC 2d 226, 22 RR 2d 794 (1971). The extension application was eventually granted. Gross Broadcasting Co., 41 FCC 2d 729, 27 RR 2d 1543 (1973).

did not motivate Raystay to seek extensions, and the discussions Raystay had with prospective buyers (which never resulted in any agreements) did not make its extension applications improper. Raystay had a good faith desire to develop a business plan and build the stations. Nothing more was required. No lack of candor exists.[15]

C. The Allegations of Misrepresentation

173. In its findings of fact, TBF alleges that five of the statements in Exhibit 1 were misrepresentations. TBF Findings, ¶¶316-373, Pp. 235-266. Two of the allegations have been dealt with and been shown to be absolutely specious - the arguments concerning the discussions with program suppliers (¶¶364-368, Pp. 262-264) and concerning the lack of any mutually exclusive applications (¶¶369-373, Pp. 264-266). TBF's attack on the other three statements is equally unavailing. They rely on rank speculation and offer no competent evidence whatsoever of intent to deceive.

1. Discussions With Site Owners

174. TBF extensively attacks the following sentence in Exhibit 1: "It [Raystay] has entered into lease negotiations

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[15] The Bureau errs when it claims that Trinity and Raystay had agreed on a sales price for the construction permit. Bureau Conclusions, ¶328 P. 169. While Trinity sent Raystay contracts proposing a price of $5,000 a permit, no evidence exists that Raystay ever agreed to that (or any other) price.

with representatives of owners of the antenna site specified in the application, although those negotiations have not been consummated." TBF challenges David Gardner's testimony that he had discussions with the site owners at all. TBF Findings ¶¶323-331, Pp. 238-244. It also argues that even if David Gardner's testimony is accepted at face value, the statement is false because his discussions cannot be considered "lease negotiations." TBF Findings, ¶¶317-322, Pp. 235-237. The Bureau joins in the latter argument. Bureau Conclusions, ¶334, Pp. 172-173. The first argument is a specious mix of distortions and speculation. The second argument is, in essence, a semantic quibble over the meaning of the term "lease negotiations". TBF and the Bureau have offered no evidence that anyone associated with Raystay considered the statement false, so they have no evidence of intent to deceive, which is an essential element of misrepresentation.

175. In the first sentence of ¶324 of its findings, TBF writes:

> Both Barry March (Lebanon) and Edward Rick (Lancaster) are adamant that they do not recall having any conversation of the kind that David Gardner claims he had with the site owner representatives on October 10, 1991.

The fact that they do not remember a short phone call from almost three years ago does not establish that the calls did not take place - it is highly doubtful whether anyone can

remember all of the short phone calls they had three months ago. More importantly, the finding is affirmatively misleading in light of the following testimony of Mr. March (TBF/Glendale Joint Ex. 5, P. 66):

> A. All right. The potential would exist that I had a short telephone conversation with somebody after the initial contact, after the visitation. I don't recall it, but I'm not denying the possibility doesn't exist.

In light of that testimony, there is clearly no conflict between David Gardner and March. Furthermore, it is just as likely that Rick also forgot his phone call. Doubtless, his concrete business was far more important to him than this matter.

176. TBF next argues that David Gardner could not have spoken to Mr. March at 9:08 a.m. because "March testified that he typically does not leave home in the morning until 9:30 or 9:45 and has to drive 40 minutes to get to his office at the hotel." TBF Findings, ¶324 P. 239 (emphasis added). The speciousness of that argument is apparent on its face. Just because March typically arrives at work later does not mean that he was not in the office at 9:00 that morning. As March indicated, special meetings or functions would cause him to arrive earlier sometimes. TBF/Glendale Joint Ex. 5, Pp. 97-98. TBF had both evidentiary burdens under this issue, and that testimony does nothing to advance either burden.

177. The next argument is that David Gardner could not have spoken to Mr. Rick because:

> he testified that he was not expecting the visit he received from Trinity's engineer on October 16, 1991, since nobody to his knowledge had telephoned in advance to arrange that visit.

That finding miscasts Mr. Rick's testimony. He did not say that he did not recall on October 16, 1991 a telephone conversation on October 10, 1991. Instead, he testified on September 10, 1993 (the date of his deposition):

> Q. Did anyone telephone in advance to arrange that visit?
>
> A. To my knowledge and recollection, no, sir.

TBF/Glendale Joint Ex. 6, P. 41. In other words, he did not remember such a telephone call in 1993. That is hardly competent evidence that the discussion did not take place. Moreover, there is a perfectly logical reason he would remember the meeting but not the earlier phone call - he had a note of the meeting in his records. TBF/Glendale Joint Ex. 6, P. 141.

178. TBF's next argument is that the telephone calls were short enough that David Gardner could not have discussed what he remembers discussing in so short a period. TBF Findings, ¶¶325-326, Pp. 239-240. This argument is sheer, rank speculation. Moreover, the argument is based upon a

description of procedures that were "typically" followed in the respective offices, but those procedures were not necessarily followed when David Gardner called. For instance, although Mr. Rick wanted his secretary to screen his calls, he admitted that practice was not always followed. TBF/Glendale Joint Ex. 6, P. 83. There is not one iota of competent evidence in this record that the telephone conversations did not proceed as described by David Gardner.

179. In ¶¶327-328 of its proposed findings (Pp. 240-241), TBF attacks as "highly implausible" David Gardner's testimony as to how he found the telephone numbers for the Lancaster and Lebanon sites and that he did not ask for Messrs. Rick or March by name. There is no need to debate TBF's claim that it would have been more logical to look at the applications, because, even if true, it does absolutely nothing to show that David Gardner's testimony was false. Allegations of misrepresentation "must be specific, not those capable of supporting more than one plausible conclusion." Pinelands, Inc., 7 FCC Rcd 6058, 6065, 71 RR 2d 175, 183 (1992). Speculation that somebody had to have acted more "logically" than they did does not come close to meeting that standard. Since TBF has failed to show that David Gardner did not talk to both of the site representatives, the argument that he could not have spoken to someone else at those sites (TBF Findings, ¶329 Pp. 242-243) is meaningless, even if true.

180. In footnote 66 of its proposed findings (P. 244), TBF offers its version of what happened in those phone calls:

> The most likely explanation of the 60-second calls on the phone records is that Gardner was told when he called that neither Rick nor March was available, and he simply never called back.

That claim is sheer, unadulterated speculation not supported by one iota of record evidence. TBF's argument that David Gardner could not have had the discussion he described is baseless. His testimony must be credited.

181. The second question that must be answered is was it a misrepresentation for Raystay to describe the conversations described by David Gardner as "lease negotiations." Glendale has shown in its proposed conclusions that no misrepresentation can be found in that description. Glendale Conclusions, ¶¶649-652 Pp. 377-380. The Bureau argues that the statement is false because David Gardner allegedly testified "that neither conversation involved any discussion about a 'lease'" (Bureau Findings, ¶245 P. 122) and it makes the naked claim that it was "utterly disingenuous" to describe the brief conversations as "lease negotiations." Bureau Conclusions, ¶334 P. 172. TBF does not provide any coherent explanation as to why the discussions cannot be considered "lease negotiations": it merely accepts as a given that the description is somehow false. TBF Findings, ¶¶317-323, Pp.

235-238, TBF Conclusions, ¶703 P. 487. Neither party's argument can be accepted.

182. Neither TBF nor the Bureau take into account that an intent to deceive is an essential element of misrepresentation. It is not enough to show that a description is inaccurate. In this context, it means that the party knew that the statement was false when it was made. No such showing has been made here. David Gardner believes that the phrase "lease negotiations" is accurate because he sees no meaningful difference between "discussion" and "negotiation" and because he obtained assurance that the sites continued to be available. Tr. 4739-4740, 4906-4908. Assume, arguendo, that the Presiding Judge disagrees with the use of that phrase. There is no evidence that David Gardner believed the characterization to be inaccurate, so no finding can be made that he thought the statement was an attempt to deceive the Commission. Moreover, both Lee Sandifer and George Gardner believed that the statement was correct based upon their knowledge. Thus, any evidence of intent to deceive is totally missing from this record.

183. TBF points to the testimony of Messrs. March and Rick that they do not recall any lease negotiations. TBF Findings, ¶¶318-319, Pp. 235-236. Since they do not recall the conversations taking place, they are not competent to say whether the discussions in question were "lease negotiations"

or not. Rick, moreover, has an idiosyncratic definition of the term. After admitting that he wrote a letter setting forth proposed terms of a lease and admitting that he had discussions concerning his willingness to negotiate a lease agreement, he denied those transactions were lease negotiations. TBF/Glendale Joint Ex. 6, Pp. 77-78, 139. That testimony is inconsistent with TBF's apparent definition of the term as encompassing the discussion of possible terms and conditions.

184. The Bureau relies on the following testimony at Tr. 4907 to argue that the description of "lease negotiations" was misleading:

> JUDGE CHACHKIN: But you didn't negotiation [sic] any lease did you for the use of the site?
>
> MR. GARDNER: No, sir.
>
> JUDGE CHACHKIN: You didn't discuss negotiating a lease for the use of the site did you?
>
> MR. GARDNER: I didn't discuss negotiating a lease for the site, no.

In fact, Raystay told the Commission that it had not negotiated a lease for the site by informing it that any negotiations had not been consummated. With respect to the second question, one can discuss terms and conditions of a lease without discussing the actual negotiating of a lease.

185. In any event, David Gardner's subsequent testimony at Tr. 4907-4908 clearly explains his acceptance of the term: he believed his confirmation of the sites' continued availability constituted lease negotiations. It is axiomatic that the most basic "term and condition" of any lease is the willingness to enter into a lease at all. TBF does not provide any clear explanation as to why his explanation is inherently unreasonable: it merely uses pejorative terms such as "gibberish" and acts as if it is obvious that the description is wrong. Even if the Presiding Judge disagrees with the characterization, however, no showing has been made that David Gardner is being disingenuous or that he believed the characterization to be inaccurate.

186. The brevity of the telephone calls does not establish any misrepresentation on the part of David Gardner. First of all, it is not correct to assume that lease negotiations cannot take place in a brief phone call. For example, a tenant and landlord could discuss the rent for an apartment in a very brief telephone call - such a discussion would be lease negotiations. More importantly, David Gardner's state of mind is that the calls were four or five minutes long. Tr. 4719. It is therefore impossible for TBF and the Bureau to argue that David Gardner should have thought to himself that the characterization was inaccurate because he knew the calls were only one minute long. The telephone

records concerning the call (TBF Ex. 228) were not researched until after the issue was added. Tr. 4719-4720.

187. In ¶330 of its proposed findings (P. 243), TBF claims that a declaration submitted by David Gardner in this proceeding was materially false because he averred that he discussed lease terms with the individuals. This argument ignores his testimony that he discussed the continued availability of the site, which he considered to be a lease term. Whether or not one agrees with his reasoning, no showing has been made that he considered the description a knowing falsehood.

188. Finally, TBF's attack on George Gardner's explanation as to why he accepted David Gardner's representation (TBF Findings, ¶¶332-333, Pp. 244-245) is baseless speculation. First, it is incorrect that David Gardner was not assigned any responsibility for the LPTV project. He was at least partly responsible for the idea to apply for the permits in the first place. Tr. 4873. Mr. Etsell asked David Gardner to contact program suppliers. Tr. 4876. Moreover, what George Gardner said is, "part of David Gardner's job responsibility was to negotiate such leases for Raystay." Glendale Ex. 208, P. 4. Mr. Sandifer, David Gardner's supervisor, confirmed this. Tr. 5157. Second, the argument that the commencement of lease negotiations was inconsistent with the lack of a business plan is baseless. It

would be perfectly appropriate to keep in touch with the site owners while trying to develop a business plan. Moreover, when Bureau counsel suggested to Mr. Sandifer that there was such an inconsistency, Mr. Sandifer did not see any inconsistency. Tr. 5157. Finally, the ideas that lease negotiations would have had to have come up at the monthly staff meetings between Mr. Sandifer, Mr. Etsell, and George Gardner is rank, baseless speculation. TBF also ignores the fact that Mr. Sandifer believed the statement to be accurate based upon what David Gardner had told him. Tr. 5155-5157. In short, nothing in the findings of TBF and the Bureau undercuts Glendale's detailed showing (Glendale Conclusions, ¶¶647-653, Pp. 376-380) as to why the statement is not a misrepresentation.

2. David Gardner's Visits to the Transmitter Sites

189. Next, TBF attacks the following statement concerning visits to the transmitter sites:

> A representative of Raystay and an engineer have visited the antenna site and ascertained what site preparation work and modifications need to be done at the site.

Glendale has already shown above that the attack on the reference to the engineer's visit is totally baseless. The attack on the reference to visits by "a representative of Raystay" (i.e., David Gardner) (TBF Findings, ¶¶338-353, Pp.